82-583
No.

Office-Supreme Court, U.S.
FILED
OCT 4 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KALMAN R. HETTLEMAN, ET AL.,
Petitioners,

v.

JOHN R. BLOCK, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether, absent statutory authority, the United States Department of Agriculture may reduce a State's food stamp grant without affording the State any due process rights and without obtaining a judicial determination that the State owes the funds to the federal government?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Hettleman prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 6, 1982.

OPINIONS BELOW

The United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit each decided the issues raised in this action on two occasions. The District Court first granted sum-

mary judgment for Maryland in an opinion which is reported at 480 F. Supp. 782 (D. Md. 1979), and attached hereto as Appendix A. The Court of Appeals then reversed, in an opinion reported at 642 F.2d 63 (4th Cir. 1981), and attached hereto as Appendix B, and remanded the case to the District Court.[1] On remand, the District Court granted summary judgment for the United States Department of Agriculture (hereinafter USDA) in an unreported opinion which is attached hereto as Appendix C. Maryland appealed and the Court of Appeals affirmed the District Court in an unreported *per curiam* opinion dated July 6, 1982, which is attached hereto as Appendix D.

JURISDICTION

The judgments of the Court of Appeals for the Fourth Circuit were entered on February 17, 1981, and on July 6, 1982. This petition was filed within 90 days of the judgment entered July 6, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves rights secured by the Spending Power Clause of Article One, § 8 of the United States Constitution.

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[1] After the District Court's reversal, Maryland did not file a petition for certiorari with this Court. Nevertheless, Maryland has not waived its right to invoke this Court's jurisdiction on the legality of the offset imposed in reliance on 7 CFR 271.7(c) (1978). On certiorari to review a final decree, this Court may correct errors which occurred in the lower court prior to a Court of Appeals' initial entry of judgment even though no attempt was made to secure immediate review of the interlocutory decree. *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365-366 n.1 (1973); *Mercier v. Theriot*, 377 U.S. 152, 153 (1964). Simply stated, this Court "may consider questions raised on the first appeal, as well as those that were before the Court of Appeals upon the second appeal." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916).

STATUTORY PROVISION INVOLVED

The relevant provision to the Food Stamp Act, 7 U.S.C. 2013(c) (1964), provides:

> The Secretary shall issue such regulations, not inconsistent with this Act, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program.

REGULATORY PROVISION INVOLVED

7 C.F.R. § 271.7(c) (1978) provides:

> If FNS [Food and Nutrition Service] determines that there has been a loss of coupons distributed to the State agency, or of the sums required be collected by it in payment of the purchase requirement, including the cash equivalent of any vouchers or warrants accepted by it in accordance with § 271.6(c), including, but not limited to, coupons or funds lost as a result of thefts, embezzlements, or unexplained causes, the State agency shall, on demand by FNS, pay to FNS the face amount of any such coupons and the amount of such cash or cash equivalent. Coupons which are lost will be presumed to have been redeemed in the customary channels of redemption: *Provided*, That the State agency will be relieved of liability for such coupons which it establishes to the satisfaction of FNS were recovered or destroyed prior to presentation for redemption.

STATEMENT OF THE CASE

The Food Stamp Act authorizes the United States Department of Agriculture to issue food stamps to participating State agencies for distribution to needy eligible individuals. All 50 States participate in this cooperative federal-state program and are, therefore, eligible to receive matching administrative funds. 7 U.S.C. 2024(b). Grant payments for administrative expenses are made by letter of credit. 7 C.F.R. 275.11(b) and (c) (1978).

In 1976, food stamps worth $113,962 were stolen from local distribution centers in Maryland. The State was never determined to be negligent or otherwise at fault for these thefts. Nevertheless, USDA sought reimbursement under the strict liability standard of 7 C.F.R. 271.7(c) (1978). When Maryland refused to reimburse USDA the federal agency deducted $113,962 from Maryland's food stamp letter of credit.[2] USDA afforded the State no due process protection in the form of any sort of hearing nor sought a judicial determination that the State owed the monies to the federal agency.

The Maryland Department of Human Resources (hereinafter Maryland or Petitioner) administers the State's food stamp program. On behalf of Maryland, the Department Secretary, Kalman R. Hettleman, sued the Secretary of Agriculture. Maryland claimed that USDA was not authorized to offset from the State's allocation for food stamp administrative expenses an amount equal to the value of the stolen food stamps.

The District Court held that USDA's regulation imposing strict liability on Maryland for stolen stamps was not consistent with the purposes of the Food Stamp Act and exceeded USDA's rule-making authority. (App. 6a). USDA appealed from this decision. The Court of Appeals reversed and remanded the case for a determination as to: 1) whether the rule was promulgated in accordance with the Administrative Procedure Act; and 2) whether the reduction of Maryland's grant was authorized. (App. 18a, 21a). On remand, the District Court granted summary judgment for USDA. (App. 38a). Maryland appealed and the Court of Appeals affirmed. (App. 41a). Petitioner now seeks review of the decisions below which held that USDA has statutory authority to reduce Maryland's food stamp grant for

[2] Settlement of one of the claims at issue reduced the amount in dispute to $106,164.

administrative expenses without affording the State any due process protection and without obtaining a judicial determination that the funds are due.

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals Decided The Important Federal Question Of Whether, Absent Statutory Authority, The United States May Reduce A State's Food Stamp Grant Without Affording The State Due Process Protection And Without Obtaining A Judicial Determination That Funds Are Due. This Question Has Not Been, But Should Be, Settled By This Court.

The judgment below allowed USDA, absent statutory authority, to reduce Maryland's food stamp grant without a prior judicial determination that the funds are due. That decision is closely related to and at odds with the decision of this Court in *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), as to constitutional restrictions on the federal government in the conduct of cooperative federal-state grant programs.

Pennhurst State School v. Halderman held that Congress may fix the terms on which it disburses money to the States, but that legislation enacted under the Spending Power Clause of the United States Constitution is subject to specific limitations to assure fairness to the States:

> . . . (such) legislation . . . is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly, accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so

> unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. 1 at 17. (citations and footnotes omitted).

Pennhurst establishes that legislation enacted under the Spending Power is valid only if the conditions that Congress imposes on the grantee States are stated explicitly in the statute creating the grant program. Thus, in cooperative federal-state programs, the "contract" creating those conditions is the authorizing statute. The statute dictates the nature of the agreement entered into between Congress and the States. *Pennhurst* holds that the States are entitled to fair treatment in this cooperative relationship: the States are entitled to know in advance the conditions attached to their receipt of federal funds. *Id.* at 17. Moreover, the federal government, after distributing funds, may not unilaterally change the terms on which funds were distributed. *Id.* at 25. Such action would unfairly disturb the settled contractual expectations held by the States.

The facts of *Pennhurst* required this Court to examine the conditions in a statute to determine if they were sufficiently definite to hold a State to a certain standard of conduct. The instant case poses a related question but one not raised by *Pennhurst*.[3]

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[3] In *Pennhurst*, the Congress exercised its Spending Power Authority by enacting the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, as amended 42 U.S.C. § 6000 et seq. (1976). Section 6010 is the "bill of rights" provision of the law. This Court decided that section 6010 was not clear and unambiguous enough to impose on the States, as a condition of receipt of federal funds under the Act, an obligation to spend State money to further the rights contained in section 6010. *Pennhurst State School v. Halderman*, 451 U.S. 1, 18-27 (1981).

Here, Congress exercised its authority under the Spending Power to enact the Food Stamp Act of 1964. H.R. No. 10222, 1 U.S. Code Cong. & Admin. News 800-808 (1964). That statute contains no provisions authorizing USDA to reduce a State's food stamp grant because stamps had been stolen from a distribution center. Thus, the issue here is not whether statutory conditions violate the Spending Power.[4] Maryland's challenge here is to a federal agency's imposition of a monetary sanction when such action is not authorized by the statute.

The Food Stamp Act of 1964 contains a general enabling provision which states:

> (t)he Secretary shall issue such regulations, not inconsistent with this Act, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program.

7 U.S.C. § 2013(c) (1964). There is nothing in this language which authorizes the federal government to

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[4] Indeed, under the reasoning in the *Pennhurst* decision, only one provision in the 1964 Food Stamp Act imposes a clearly stated condition of potential financial liability on the States. That provision is 7 U.S.C. § 2019(f) (1964), which provides:

> If the Secretary determines that in the administration of the program there is a failure by a State agency to comply substantially with the provisions of this Act, or with the regulations issued pursuant to this Act, or with the State plan of operation, he shall inform such State agency of such failure and shall allow the State agency a reasonable period of time for the correction of such failure. Upon the expiration of such period, the Secretary shall direct that there be no further issuance of coupons in the political subdivisions where such failure has occurred until such time as satisfactory corrective action has been taken.

It is undisputed that Maryland did not violate this condition.

By contrast, the financial liability of the federal government under the act is extensive. Food stamps are obligations of the United States, redeemable by the U.S. Treasury. 7 U.S.C. § 2013, 2023(a) (1964). Moreover, the Secretary of Agriculture is authorized to pay each State up to 50% of its administrative costs for operation of the program. 7 U.S.C. § 2024(b) (1964).

withdraw food stamp funding without affording the State any due process rights or obtaining a judicial interpretation that the State owes the funds to the federal government. Yet, allegedly, pursuant to this provision, USDA promulgated a regulation which provided:

> If [USDA] determines that there has been a loss of coupons distributed to the State agency, or of the sums required to be collected by it in payment of the purchase requirement, . . . including, but not limited to, coupons or funds lost as a result of thefts, embezzlements or unexplained causes, the State agency shall, on demand by [USDA], pay to [USDA] the face amount of any such coupons, and the amount of such cash or cash equivalent.

7 C.F.R. 271.7(c) (1978). This regulation was the basis of USDA's action deducting from Maryland's letter of credit for administrative expenses an amount equal to the amount of the stolen stamps.

USDA's offset was unfair because it was grounded upon a rule which was contrary to the stated goal of the food stamp program. The explicit purpose of the program is to alleviate hunger and malnutrition among the needy. 7 U.S.C. § 2011 (1964). The individuals harmed by the offset were the intended recipients of the stolen stamps. Holding Maryland strictly liable for stolen stamps does not further, and indeed may thwart, the express statutory purpose of the program. *Hettleman v. Bergland*, 480 F. Supp. 782, 786 (D. Md. 1979).

Maryland never was determined responsible for the thefts and neither the stolen stamps nor their cash equivalent were returned to the State. Maryland is dependent upon the federal monies received for administrative costs in order to operate its program. Therefore, USDA's reduction of Maryland's grant disturbed the

State's settled expectations of its responsibilities in the food stamp program.[5]

The issue not before this Court in *Pennhurst* but presented by this dispute is whether, absent statutory authority, a federal agency may unilaterally and retroactively impose conditions on the receipt of federal funds in contravention to a bargain previously struck between Congress and the States. Petitioner submits that the rationale of *Pennhurst* dictates that a federal agency may not take such action. A federal agency should be subject to no lower a standard in its dealings with the States than is Congress. The agency, like Congress, must treat the States with fairness. Here, USDA irrebuttably presumed that Maryland was responsible for the stolen stamps without affording the State an opportunity to contest the imposition of a strict liability condition not mentioned in the 1964 statute, and without first obtaining a judicial determination that Maryland owed USDA the money.

The decision below permits the federal government to impose substantial fiscal sanctions on States without first affording them any procedural protection. For Maryland, this principle potentially jeopardizes the State's receipt of millions of dollars in the numerous cooperative federal-state programs in which it participates. Nationally, there are billions of federal dollars at stake in grant programs. The Fourth Circuit's decision in this case allows the

[5] When Congress decided to authorize such action it did so explicitly. It conferred on USDA in the 1977 Amendments to the Food Stamp Act the powers it previously lacked to hold States strictly liable for financial losses involved in the issuance of coupons, 7 U.S.C. § 2022(a) (1977). The omission of these provisions in the 1964 statute under which this dispute arose and their addition to the 1977 law reinforce Maryland's position that the decisions below are inconsistent with the *Pennhurst* decision, and, consequently USDA lacked authority under the 1964 Act, prior to its 1977 amendment, to demand strict liability and to impose an offset on that basis. *See Hettleman v. Bergland*, 480 F. Supp. 782, 789 (D. Md. 1979).

federal government to administer these programs arbitrarily and with impunity. Petitioner submits that such action violates fundamental fairness in a cooperative federal-state scheme. If this Court grants this petition, the Court has an opportunity to declare that such action is unfair and unlawful.

2. The Decision Below Is In Direct Conflict With The Decision Of The Third Circuit On This Issue.

The Court of Appeals for the Third Circuit properly applied the rationale of this Court's decision in *Pennhurst* in *New Jersey v. Hufstedler*, 662 F.2d 208, 214 (3rd Cir. 1981), petition for certiorari filed *sub nom. Bell v. New Jersey*, No. 81-2125 (May 17, 1982). In *New Jersey v. Hufstedler* the appellate court considered the authority of the United States Department of Education to compel repayment from a State, after administrative proceedings, funds allocated to it under an educational grant program. The educational program involved operated through an advance-funding method similar to the letter-of-credit system used in the food stamp program. The court analyzed the federal agency's statutory authority in light of what it characterized as the "overarching principle of *Pennhurst*, — that the terms of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant" when the federal government seeks to impose conditions on States for receipt of federal funds. *New Jersey v. Hufstedler, supra*, at 214.

The Third Circuit rejected the federal agency's claim of inherent authority to compel repayment of funds:

> We therefore hold that an administrative agency has no authority to order repayment of funds misapplied or misspent by federal grant participants unless Congress, at the time the funds are received, has declared its intention to empower the agency to

> exercise such a remedy. In the absence of congressional authority, the remedy exists, if at all, only at common law. We further hold that if an agency employing an advance-funding scheme such as that provided for in Title I relies on a common-law right to recover misspent funds, it may do so only by maintaining a civil action in a court of competent jurisdiction.

662 F.2d 208, at 218.[6]

The Third Circuit Rule of *New Jersey v. Hufstedler* is in direct conflict with the rule in the Fourth Circuit on this issue. The decision below and in another Fourth Circuit case, *West Virginia v. Secretary of Education*, 667 F.2d 417 (1981), have upheld the authority of federal agencies to require the States to refund grants without a judicial determination that the monies are due. Notably, unlike the Third Circuit, the Fourth Circuit opinions make no reference to the "overarching principle of *Pennhurst*."

A writ of certiorari should issue so that this Court may resolve the direct conflict between the Third and Fourth Circuits on this issue. The Solicitor General agrees that the Third and Fourth Circuits are in direct conflict on this issue. *See* Petition for Certiorari, *Bell v. New Jersey*, No. 81-2125, at 10-12. *See also* Maryland's *amicus curiae* brief in support of granting the petition for certiorari in *Bell v. New Jersey*, at 4-6.

3. This Petition Should Be Considered In Light Of The Disposition Reached On The Petition In *Bell v. New Jersey*, No. 81-2125.

The Solicitor General's petition for certiorari in *Bell v. New Jersey*, No. 81-2125, presents two questions: 1) whether, in the absence of specific statutory authority,

[6] Petitioner's brief and argument below relied upon the *New Jersey v. Hufstedler* decision, but the court below did not mention the case in its opinion.

federal agencies may require recipients of grant-in-aid funds to repay amounts that have been determined, after an administrative hearing, to have been misspent, and 2) if not, whether there is sufficient statutory authority to permit such recoupment of improper expenditures under Title I of the Elementary and Secondary Education Act of 1965.

This petition presents substantially the same questions under the Food Stamp Act as those raised in *Bell* under the Elementary and Secondary Education Act. Therefore, this petition should be considered in light of the disposition reached in *Bell*.

CONCLUSION

If certiorari is granted in *Bell v. New Jersey*, No. 81-2125, this petition should be granted, and the cases set for argument and consideration together. Alternatively, if certiorari is granted in *Bell* and the Court is not inclined to grant this petition and consider the cases together, the Court should grant this petition or defer disposition in this matter until it has decided *Bell*.

If certiorari is denied in *Bell v. New Jersey*, this petition should be granted.

Respectfully submitted,

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October, 1982

APPENDIX A

In The United States District Court
For The District of Maryland

Civil No. Y-78-2039

Kalman R. Hettleman, et al.

v.

Robert Bergland, et al.

Filed: 11/23/79

Young, United States District Judge

This case, before the Court on cross-motions for summary judgment, arises under The Food Stamp Act of 1964, 7 U.S.C. §§ 2011-2026, and involves a dispute between the State of Maryland Department of Human Resources (DHR) and the United States Department of Agriculture Food and Nutrition Service (USDA-FNS) over the validity of USDA regulation 7 C.F.R. § 271.7(b) (1971) [since renumbered 7 C.F.R. § 271.7(c) (1976) and referred to hereafter as § 271.7(c)] insofar as it imposes a standard of strict liability on the State for the face value of food stamps stolen after they have been delivered into the custody of the State or its distributing agents and the action of the USDA in setting off the face value of food

stamps stolen in 1976 from three Maryland distribution centers against the State's 1978 federal letter of credit.*

THE FOOD STAMP ACT OF 1964

BACKGROUND

The Food Stamp Act of 1964 was amended a number of times after its initial enactment and was eventually replaced by The Food Stamp Act of 1977 (1977 Act). Unless specifically noted, the following discussion is based on the terms of the Act, as amended, which was in effect at the time of the Maryland thefts in 1976 (1964 Act).

The 1964 Act authorized the USDA to issue coupons in various denominations for purchase by eligible households at rates below their face value. The USDA issued the coupons to participating state agencies, which handled the distribution to eligible recipients. The recipients, in turn, used the coupons at their face value to purchase food and other commodities listed in the Act from approved retail and wholesale food concerns. The food stamps, or coupons, "issued and used as provided in [the] Act," were (and still are) redeemable at face value by the USDA-FNS through the facilities of the United States Treasury and were "deemed to be obligations of the United States within the meaning of title 18, United States Code, section 8." 7 U.S.C. §§ 2013(a), 2023(d).

STATE RESPONSIBILITY AND LIABILITY PROVISIONS IN THE 1964 ACT

The states which elected to participate in the food stamp program were responsible under the terms of the Act for certifying eligible recipients in accordance with criteria established by the USDA, for designating and approving coupon vendors and participating retail and wholesale food suppliers, and, in general, for administering the food

* A dispute over a theft from a fourth distribution center has been settled since the filing of the plaintiffs' original claim and the value of those stamps restored to the State's federal letter of credit.

stamp program under plans and procedures drawn up by the states and approved by the USDA. The costs of the benefits provided under the Act were borne by the federal government, and, in addition, 7 U.S.C. § 2024(b) authorized the Secretary of Agriculture to pay to each state an amount equal to 50% of its administrative costs, provided that no such payment be made to any state "unless the Secretary is satisfied pursuant to regulations which he shall issue that an adequate number of qualified personnel are employed by the State in the program to administer the program efficiently and effectively."

Apart from the responsibility for efficient and effective administration, the only specific references to state liability in the Act were to be found in 7 U.S.C. § 2019. § 2019(f) provided that, if the Secretary determined that in the administration of the program a state agency had failed to comply substantially with the provisions of the Act or with regulations issued pursuant thereto, and if that state agency failed to correct such failure within a reasonable period of time, "the Secretary shall direct that there be no further issuance of coupons in the political subdivisions where such failure has occurred until such time as satisfactory corrective action has been taken." § 2019(g) provided:

> If the Secretary determines that there has been gross negligence or fraud on the part of the State agency in the certification of applicant households the State shall upon request of the Secretary deposit into the separate account authorized by . . . this Act, a sum equal to the amount by which the value of any coupons issued as a result of such negligence or fraud exceeds the amount that was charged for such coupons. . . .

RULE-MAKING AUTHORITY UNDER THE ACT

The 1964 Act contained fifteen separate provisions authorizing the Secretary to promulgate regulations. Fourteen of those related to specific aspects of the administration of the food stamp program. There was no

provision specifically authorizing the promulgation of regulations establishing state liability under the Act. However, § 2013(c) provided:

"The Secretary shall issue such regulations, not inconsistent with this Act, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program."

Pursuant to that general grant of rule-making authority, the USDA in 1971 promulgated the contested regulation, which provides as follows:

> If FNS determines that there has been a loss of coupons distributed to the State agency, or of the sums required to be collected by it in payment of the purchase requirement, including the cash equivalent of any vouchers or warrants accepted by it in accordance with § 271.6(c), including, but not limited to, coupons or funds lost as a result of thefts, embezzlements or unexplained causes, the State agency shall, on demand by FNS, pay to FNS the face amount of any such coupons, and the amount of such cash or cash equivalent. Coupons which are lost will be presumed to have been redeemed in the customary channels of redemption: Provided, that the State agency will be relieved of liability for such coupons which it establishes to the satisfaction of FNS were recovered or destroyed prior to presentation for redemption.

Factual Background of this Dispute

The Department of Human Resources (DHR) has been designated by the State of Maryland to administer the food stamp program in the state, and the actual operation of the program is handled by the Social Services Administration (SSA) offices in Baltimore City and in the 23 Maryland counties. During fiscal year 1976, the total value of coupons distributed to certified eligible recipients in Maryland amounted to $134,100,421. During that year, there were thefts of stamps and cash from distribution centers in Baltimore City and in Allegany, Wicomico and

Charles Counties in the total amount of $113,962, or approximately .08% of the total. Of that amount, stamps and cash totaling $7,818 stolen from Baltimore City are no longer at issue, reducing the total disputed amount to $106,164.

Although there was no allegation of negligence on the part of the state agencies from which the stamps were stolen, nor any evidence offered to indicate that the stolen stamps were actually redeemed by the Treasury, the USDA-FNS demanded reimbursement of the face value of the stolen stamps pursuant to the terms of the above-quoted regulation. When the State refused to comply with the demand, the USDA reduced payment of its 50% share of administrative costs by deducting the disputed amount from the state's 1978 federal letter of credit.

DHR then brought suit against USDA-FNS under the 1964 Act, 7 U.S.C. § 2011 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, asserting jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1337, and 5 U.S.C. §§ 701-706 *et seq.*, and claiming an amount in controversy in excess of $10,000. Pursuant to 28 U.S.C. § 1361 (providing for mandamus) and 28 U.S.C. § 2201 (providing for declaratory relief), the State asks the Court to declare the action of USDA-FNS null and void; to order the withheld funds restored to its 1978 letter of credit; and to declare the regulation, 7 C.F.R. § 271.7(c) (1976), unenforceable.

The State has offered a three-pronged argument to support its claim for relief:

1. that the regulation imposing upon the State a standard of strict liability for lost or stolen food stamps has no basis in the statute and that the promulgation of such a standard exceeded the Secretary's rule-making authority under the 1964 Act;

2. that the regulation was not promulgated in accordance with the requirements of the Administrative Procedure Act (APA); and

3. that there was no statutory basis for the reduction of the federal share of administrative costs by setting off the value of the stolen cash and coupons against the State's federal letter of credit and that the set-off violated the terms of the 1964 Act.

An analysis of the 1964 Act indicates that the promulgation of regulation 7 C.F.R. § 271.7(c) (1976) exceeded the rule-making authority granted to the Secretary by the Act, and summary judgment must be granted to the plaintiffs. It is therefore not necessary to consider the plaintiff's second and third arguments.

ANALYSIS

All parties agree that the 1964 Act contained no provision making participating states liable for the value of the coupons in their possession absent fraud or gross negligence in the certification of eligible recipients. Nor did the Act contain any provision specifically authorizing the Secretary of Agriculture to promulgate regulations regarding state liability. For the contested regulation to fall within the Secretary's authority, therefore, it must meet the requirements of § 2013(c). Not only must it have been deemed "necessary or appropriate for the effective and efficient administration of the food stamp program," it must also be consistent with the provisions of the Act as a whole.

While acknowledging that the Act was silent on states' liability for stolen food stamps and that the only specific liability provisions in the Act established a standard of fraud or gross negligence, the defendants contend that some standard of state liability was necessary to the effective and efficient administration of the food stamp program and that, using the rationale of *Knebel v. Hein*, 429 U.S. 288 (1977), the Secretary was empowered by § 2013(c) to select any standard he deemed appropriate, including a standard of strict liability.

In *Knebel*, the Court considered USDA regulations defining income for the purpose of determining eligibility

under the food stamp program and observed that the Secretary might have defined income in a number of ways and chose one. "But the availability of alternatives doesn't render [his] choice invalid." *Id.* at 294.

In *Mourning v. Family Publications Service*, 411 U.S. 356 (1973), upon which the defendants also rely, the Court considered a Federal Reserve Board regulation promulgated pursuant to general rule-making authority under the Truth in Lending Act. Citing earlier cases which had upheld the validity of administrative regulations, the Court said that, where a statute authorizes the promulgation of such rules and regulations as may be necessary to carry out the provisions of the Act, validity of a regulation will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." *Id.* at 369.

The issue now before the Court is clearly distinguishable from the issues in *Knebel* and *Mourning* and from the issues before the courts in earlier cases cited in *Mourning* such as, *e.g.*, *Thorpe v. Housing Authority*, 393 U.S. 268, 280-81 (1969) (purpose of the Act to provide suitable living environment clearly implemented by regulation prohibiting eviction of tenant from federally subsidized housing without explanation); *American Trucking Associations v. United States*, 344 U.S. 298, 309-10 (1953) (upholding regulation designed to cure abuses at which legislation was aimed); *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945) (upholding regulation under Fair Labor Standards Act on ground that the regulation was necessary to avoid self-nullification of the statute and "absolutely essential" to maintain the wage rate); *Charnita, Inc. v. Federal Trade Commission*, 479 F.2d 684 (3rd Cir. 1973) (regulation sustained as within power of the Board to prevent non-compliance with statute via subterfuge).

The purpose of the 1964 Act as set forth in its Declaration of Policy was to alleviate hunger and malnutrition by "permit[ting] low-income households to purchase a nutritionally adequate diet through normal channels of trade." 7 U.S.C. § 2011. A regulation defining

income, such as that considered in *Knebel*, was "reasonably related to the purposes" of the Food Stamp Act, and the Court noted that "the implementation of the statutory purpose provides a sufficient justification for . . . the federal regulations. . . ." 429 U.S. at 296-97. That regulation could therefore be deemed necessary to the effective and efficient administration of the food stamp program. The same cannot be said for the regulation now before the Court.

Assuming *arguendo* that it was necessary or appropriate to the effective and efficient administration of the food stamp program to impose some standard of liability on the states for lost or stolen coupons, the defendants contend that it was more rational to impose a strict liability standard than to try to determine whether the state had been negligent in its storage, handling or accounting of coupons. The defendants do not explain, however, how the effective and efficient administration of a program designed to alleviate hunger and malnutrition can be furthered by placing an additional burden on the very entities — the states and their designated agencies — which are responsible for delivering the federal benefits offered by the program. On the contrary, it appears more rational to fear that the imposition of too onerous a burden on the states might impel them to withdraw from the program, thus depriving their citizens of those benefits and frustrating the purpose of the Act.

Plaintiffs argue that the strict liability standard of § 271.7(c) is inconsistent with the 1964 Act in several respects. The most obvious argument, of course, draws an inference from the fact that the Act imposes on the states the lower standard of gross negligence or fraud in the certification of food stamp recipients.

A second, but probably more pertinent, argument can be derived from the fact that § 2013(c) represents a narrower grant of rule-making authority than that contained in other legislation in that it limits the issuance of regula-

tions to those necessary or appropriate to the "administration" of the food stamp program rather than, like the Truth in Lending Act, regulations "necessary to carry out the provisions of the Act." Considering that § 271.7(c) was promulgated under the authority of § 2013(c), the loss or theft of coupons must be viewed as an administrative problem. Therefore, in the absence of any specific provision in the Act relating to lost or stolen coupons, any regulation addressing the problem must fit within the guidelines of 7 U.S.C. § 2019, which deals with administration of the food stamp program.

As further support for that argument, the defendants have acknowledged that food stamps were intended by Congress to be obligations of the federal government but urge that the federal obligation be limited to the redemption of coupons "issued and used as provided in [the] Act. . . ." 7 U.S.C. § 2013(a). Defendants, therefore, appear to argue that stolen coupons are coupons that have been improperly issued.

Both arguments lead to the conclusion that the question of the states' liability for stolen food stamps must be governed by § 2019(f), which deals with a failure by a state agency to comply substantially with the provisions of the Act and which provides that, in the event of a failure of the state agency to comply, the Secretary "shall inform such State agency of such failure and shall allow the State agency a reasonable period of time for the correction of such failure. Upon the expiration of such period, the Secretary shall direct that there be no further issuance of coupons in the political subdivisions where such failure has occurred until such time as satisfactory corrective action has been taken." The "corrective" procedure mandated by § 2019(f) is a far cry from the strict liability provisions of the disputed regulation.

So, too, are the provisions of 7 U.S.C. § 2015, entitled "Issuance and Use of Coupons," pursuant to which "[t]he Secretary shall by regulation prescribe appropriate procedures for the delivery of coupons to coupon vendors and for

the custody, care, control, and storage of coupons in the hands of coupon vendors in order to secure such coupons against theft, embezzlement, misuse, loss, or destruction." 7 U.S.C. § 2015(c)(1). (By the terms of § 2012(o), a "coupon vendor" is the "person, partnership, corporation, organization, political subdivision, or other entity with which a State agency has contracted for, or to which it has delegated administrative responsibility in connection with, the issuance of coupons to households.") § 2015(c)(1) seems firmly to place the responsibility for establishing procedures for the protection of food stamps against loss or theft on the USDA rather than on the states or their designated agencies.

Defendants point to nothing in the Act to support their contention that the imposition of a strict liability standard is not inconsistent with the Act. In fact, they indicate in the memorandum supporting the defendants' motion for summary judgment that the real purpose of the regulation is to guard against negligence on the part of the states, noting that "[a]ny loss, whether by theft or otherwise, may be the result of inadequate procedures by the state to safeguard coupons in its possession." Defendants' Memorandum at 9.

The thrust of the defendants' support for the regulation seems to be that, in view of the fact that the federal government is required under the Act to bear most of the risk involved in the issuance of food stamps, it is fair to ask the states to assume that risk when the coupons are in their custody. While there may be support for that viewpoint, that support cannot be found in the legislation pursuant to which the USDA promulgated its regulation.

PRIOR JUDICIAL INTERPRETATIONS

There have been no reported cases interpreting 7 C.F.R. 271.7(c) (1976). However, both the plaintiffs and the defendants have cited *New Mexico Department of Health and Social Services v. Secretary of Agriculture*, 376 F. Supp. 953 (D. N.M. 1973), which dealt with 7 C.F.R.

§ 1601.7(b), the predecessor regulation, which was in effect in 1970 when food stamps were stolen from a New Mexico food stamp distribution center. § 1601.7(b) provided that in the event of a failure on the part of the State agency "to account fully for the coupons distributed to it" the USDA could demand payment of the amount due as a result of such failure. The USDA took the position that the regulation made the State of New Mexico strictly liable for the stolen coupons. New Mexico countered with the argument that the regulation merely imposed upon the state a duty to "account for" coupons delivered to it and took the position that it had accounted for those coupons by reporting them stolen. The court held that the language of the regulation was ambiguous and did not sustain the imposition of strict liability. In its opinion, the court noted that the regulation had been changed in 1971 to delete the "account for" language and expressly to make state agencies liable for the face amount of stamps lost by theft. Despite the defendants' assertion to the contrary, the court expressed no opinion on the validity of the revised regulation. The court did observe, however, that "defendants' interpretation imposing strict liability is inconsistent with other parts of the Food Stamp Program regulations" and that "[t]here is nothing in the Food Stamp Act of 1964 to support their interpretation." *Id.* at 955.

The earlier, "account for," regulation was also considered in *State of Louisiana v. Butz*, 376 F. Supp. 703 (M.D. La. 1974), with the same result. In that case, the court noted the existence of *regulations* instructing the state as to how it should handle and safeguard food stamps and observed that the purpose of those regulations was to "set forth the standard of care which was required of the State while it is acting as an agent for the Department of Agriculture in the handling of . . . food stamp coupons. If that standard of care was in fact used, and if there is no showing of negligence or absence of due care on the part of the State, then there is no liability for the loss of coupons by theft." *Id.* at 705. The district court in Louisiana observed that "[i]f the regulations in effect at that time

imposed a strict liability on the State agency for loss of coupons by theft, there would have been no need for regulations instructing the State as to how it should handle and safeguard the coupons." *Id.*

Although the defendants correctly point out that there may be independent reasons for establishing a uniform standard of care — *e.g.*, the need to maintain public confidence in the administration of the food stamp program — the coincidence of a requirement in the 1964 Act that the Secretary promulgate regulations prescribing procedures for the protection of food stamp coupons against theft, specific procedures in the Act to deal with improper administration, and silence on the subject of states' liability for stolen coupons indicates that Congress did not intend in the 1964 Act to make the states strictly liable for stolen coupons absent some form of negligence or malfeasance on the part of the participating state agencies.

SUBSEQUENT LEGISLATION

The Food Stamp Act of 1977 contains the following provision:

> Notwithstanding any other provision of this chapter, the State agency shall be responsible to the Secretary for any financial losses involved in the acceptance, storage, and issuance of coupons. 7 U.S.C. § 2016(f) (1977).

As the defendants note, the legislative history regarding this section is limited to the point of being non-existent. Therefore, the defendants are correct in observing that the legislative history does not indicate that Congress intended any change in the substantive obligations of the states by the inclusion of this express requirement. Defendants' Memorandum in Support of Their Motion for Summary Judgment at 9, n.7. It can be said just as correctly, however, that the legislative history does not indicate the opposite. In fact, a determination of whether or not the new section does impose strict liability on the

states for lost or stolen food stamp coupons will have to await another dispute. The interpretation of the 1977 Act is not now before the Court.

It is worth noting, however, that the 1977 Act represents a major revision in the structure and administration of the food stamp program, and that, *inter alia*, it drastically increased the federal share of state costs for investigations and prosecutions related to food stamp abuse. S. Rep. No. 180, 95th Congress, 1st Sess. 118 (1977). The Act also eliminated the requirement that eligible recipients purchase their coupons, with a view in part to improving administration of the program, reducing the possibility for abuse and significantly reducing the states' administrative burden. *Id.* at 119.

If any inference can be drawn from the fact that Congress, in the course of a major overhaul of the program, enacted a specific provision relating to states' liability for the acceptance, storage and issuance of coupons, the inference must be that no such liability was implied in the Act as it stood before the revision.

Accordingly, for the reasons stated herein, it is this 23rd day of November 1979, by the United States District Court for the District of Maryland, ORDERED:

1. That the plaintiff's motion for summary judgment be, and the same is, hereby GRANTED;

2. That the defendant's motion for summary judgment be, and the same is, hereby DENIED; and

3. The clerk shall mail a copy of this Memorandum and Order to the counsel for the parties.

/s/ JOSEPH H. YOUNG,
United States District Judge.

In The United States District Court
For The District Of Maryland

Civil No. Y-78-2039

Kalman R. Hettleman,
Secretary, Department of Human Resources, et al.

v.

Robert Bergland,
Secretary, U.S. Department of Agriculture, et al.

JUDGMENT

In accordance with the Memorandum Opinion and Order of the Honorable Joseph H. Young filed November 23, 1979 in the above entitled case, it is

ORDERED AND ADJUDGED:

1. That 7 CFR 271.7(c) (1976) exceeds the authority granted defendants under the 1964 Food Stamp Act, as amended, 7 U.S.C. § 2011, *et seq.*

2. That 7 CFR 271.7(c) (1976) was originally adopted in 1971 in violation of the Administrative Procedure Act, and is unenforceable.

3. That the January 12, 1978 determination by the defendants to subtract $113,982.00 from the 2nd quarter allotment of Maryland's letter of credit for Food Stamp Program administrative costs is hereby declared null and void.

4. That the defendants are hereby directed to restore One Hundred Thousand, Nine Hundred Eighty-Two Dollars ($113,982.00) to the 2nd quarter allotment of Mary-

land's Letter of of Credit for Food Stamp Program administrative costs.

Dated at Baltimore, Maryland this 27th day of November, 1979.

PAUL R. SCHLITZ, Clerk
BY: /s/ R. BRUCE MCELHONE,
Deputy Clerk

APPROVED this 27th day of November, 1979.
/s/ JOSEPH H. YOUNG,
United States District Judge.

In The United States District Court
For The District Of Maryland

Civil No. Y-78-2039

Kalman R. Hettleman,
Secretary, Department of Human Resources, et al.

v.

Robert Bergland,
Secretary, U.S. Department of Agriculture, et al.

AMENDED JUDGMENT

In accordance with the Order of the Honorable Joseph H. Young filed May 22, 1980 in the above entitled case, it is

ORDERED AND ADJUDGED:

1. That 7 CFR 271.7(c) (1976) exceeds the authority granted defendants under the 1964 Food Stamp Act, as amended, 7 U.S.C. § 2011, *et. seq.*

2. That the January 12, 1978 determination by the defendants to subtract $113,982.00 from the 2nd quarter allotment of Maryland's letter of credit for Food Stamp Program administrative costs is hereby declared null and void.

3. That the defendants are hereby directed to restore One Hundred Six Thousand, One Hundred Sixty-Four Dollars ($106,164.00) to the 2nd quarter allotment of Maryland's letter of credit for Food Stamp administrative costs. Dated at Baltimore, Maryland this 22nd day of May, 1980.

PAUL R. SCHLITZ, Clerk
BY: /s/ R. BRUCE MCELHONE
Deputy Clerk

APPROVED this 22nd day of May, 1980.

/s/ JOSEPH H. YOUNG

APPENDIX B

United States Court of Appeals
for the Fourth Circuit

No. 80-1076

Kalman R. Heitleman, Secretary, Department of Human Resources, et al.

Appellees,

v.

Robert Bergland, Secretary, U.S. Department of Agriculture; et al.

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

ARGUED: Nov. 10, 1980 *DECIDED: Feb. 17, 1981*

Before INGRAHAM, Senior Circuit Judge, HALL and ERVIN, Circuit Judges.*

ERVIN, Circuit Judge:

The Secretary of the United States Department of Agriculture (USDA) appeals the district court's grant of summary judgment to the State of Maryland on Maryland's claim arising under the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964), as amended and codified, 7 U.S.C. §§ 2011 *et seq.* (1976), challenging the

* Fifth Circuit, sitting by designation.

validity of USDA regulation 7 C.F.R. § 271.7(c) (1976) under which strict liability for loss of food stamps is imposed on the states.

We reverse the district court's judgment that the Secretary exceeded his authority in promulgating the regulation. We remand, however, for consideration of two issues not addressed by the district court.

I.

Background

The Food Stamp Act of 1964 authorizes the Food and Nutrition Service (FNS) of USDA to issue food coupons through participating states' agencies to eligible households. All states have elected to participate and are thereby eligible to receive matching administrative funds. 7 U.S.C. § 2024(b). The coupons are obligations of the United States, redeemable at face value by the U.S. Treasury. 7 U.S.C. §§ 2013, 2023(a).

The matching funds are for

> all administrative costs, including, but not limited to, the cost of (1) the certification of households; (2) the acceptance, storage, and protection of coupons after their delivery to receiving points within the States; (3) the issuance of such coupons to eligible households; (4) the outreach and fair hearing requirements of section 2019 of this title; and (5) the control and accounting of coupons.
> 7 U.S.C. § 2024(b).

Under the statute, the state "shall assume responsibility for the certification of applicant households and for the issuance of coupons." 7 U.S.C. § 2019(b). It is also responsible for keeping "such records as may be necessary to ascertain whether the program is being conducted in compliance with the provisions of this chapter and the regulations issued pursuant to this chapter." *Id.* The Secretary, however,

> shall by regulation prescribe appropriate procedures for the delivery of coupons to coupon vendors and for

> the custody, care, control, and storage of coupons in the hands of coupon vendors in order to secure such coupons against theft, embezzlement, misuse, loss, or destruction.
> 7 U.S.C. § 2015(c)(1).

Two provisions in the Act specifically address the question of potential state financial liability under the Act:

> If the Secretary determines that in the administration of the program there is a failure by a State agency to comply substantially with the provisions of this chapter, or with the regulations issued pursuant to this chapter, or with the State plan of operation, he shall inform such State agency of such failure and shall allow the State agency a reasonable period of time for a correction of such failure. Upon the expiration of such period, the Secretary shall direct that there be no further issuance of coupons in the political subdivisions where such failure has occurred until such time as satisfactory corrective action has been taken.
> 7 U.S.C. § 2019(f).

And:

> If the Secretary determines that there has been gross negligence or fraud on the part of the State agency in the certification of applicant households, the State shall upon request of the Secretary deposit into the separate account authorized by section 2016 of this title, a sum equal to the amount by which the value of any coupons issued as a result of such negligence or fraud exceeds the amount that was charged for such coupons. . . .
> 7 U.S.C. § 2019(g).

Fifteen provisions authorize the Secretary to promulgate regulations. Fourteen of them relate to specific aspects of administering the food stamp program, but no provision specifically authorizes the Secretary to issue regulations regarding state liability for food stamp thefts. The general enabling provision, 7 U.S.C. § 2013(c), however, provides that

> [t]he Secretary shall issue such regulations, not inconsistent with this chapter, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program.

In 1970, pursuant to the general grant of rule making authority, the Secretary issued the following regulation:

> If C & MS [Consumer & Marketing Service, predecessor to FNS] determines that there has been a failure on the part of the State agency to account fully for coupons distributed to it, or the sums authorized to be collected by it in payment of the purchase requirement . . . the State agency shall, on demand by C & MS, pay . . . the amount due as a result of such failure. . . .
> 7 C.F.R. § 1601.7(b) (1970).

This regulation was successfully challenged as too ambiguous to impose strict liability. *See Louisiana v. Butz*, 376 F. Supp. 703 (M.D. La. 1974); *New Mexico Dept. of Health & Social Services v. Secretary of Agriculture*, 376 F. Supp. 953 (D. N.M. 1973).

In July, 1971, the Secretary promulgated a new regulation supplanting the challenged one and imposing strict liability on the states for loss of stamps:

> If FNS determines that there has been a loss of coupons distributed to the State agency, or of the sums required to be collected by it in payment of the purchase requirement . . . including, but not limited to, coupons or funds lost as a result of thefts, embezzlements or unexplained causes, the State agency shall, on demand by FNS, pay to FNS the face amount of any such coupons, and the amount of such cash or cash equivalent. . . .
> 7 C.F.R. § 271.7(c) (1978).

This Case

In 1976, the Maryland Department of Human Resources experienced thefts of food stamps from four distribution facilities; the total loss was $113,962. Although USDA sought reimbursement under § 271.7(c), Maryland refused;

USDA then deducted $113,962 from Maryland's letter of credit for the State's food stamps.[1]

Maryland then sued USDA, claiming that (1) the regulation exceeded the Secretary's rule making authority, (2) the regulation was promulgated without compliance with the Administrative Procedure Act, and (3) USDA's reduction of the administrative costs payment was unauthorized by the 1964 Act.

The district court on cross motions granted summary judgment to Maryland. Based on its analysis of the 1964 Act, the court found that promulgation of the strict liability regulation exceeded the Secretary's rule making authority; because this finding was dispositive of the case, the court expressly declined to consider Maryland's second and third arguments.

II.

We think the district court incorrectly interpreted the Act as prohibiting the Secretary from promulgating a regulation imposing strict liability on states for stolen food stamps. In *Knebel v. Hein*, 429 U.S. 288, 293 (1977), the Supreme Court specifically designated the statute's delegation of authority as "broad." *Knebel* involved a challenge to USDA regulations and parallel state regulations which disallowed a deduction for transportation expenses in connection with a job training program for purposes of computing the income of food stamp recipients. Although the Court recognized that "[u]nder the statute's broad delegation of authority, the Secretary might have defined income in a variety of ways," 429 U.S. at 293, it found that "the availability of alternatives does not render the Secretary's choice invalid. Moreover, a plainly acceptable reason exists for rejecting each of these possible alternatives." *Id.* at 294-95 (footnote omitted). The regulations did operate somewhat unfairly in *Knebel*, but

[1] One of the four claims was settled, leaving only $106,164 in dispute.

they were nonetheless "the product of a valid exercise of the Secretary's statutory authority." *Id.* at 294. The Court found the source of the Secretary's authority in his duty under § 2013 to "formulate and administer a food stamp program" and to "issue such regulations, not inconsistent with this chapter, as he deems necessary or appropriate for the effective administration of the food stamp program." Imposing an apparently low standard to be applied in determining the validity of the exercise of that power, the Court found that the contested regulations were "reasonably adopted." *Id.* 296. Section 2013, as we read it, is equally broad enough to authorize a regulation imposing strict liability on the states for coupon loss: such a regulation provides an efficient mechanism for allocating loss, places responsibility for loss with the custodian of the coupons (who is most able to guard against loss) and is, if not "necessary," then at least "appropriate" for effective administration of the program.

Maryland argues, however, that the Act implies a standard of care inconsistent with strict liability, pointing to the Act's provision requiring the Secretary to issue regulations concerning the care, custody, and handling of coupons (§ 2015(c)(1)). Maryland also stresses the Act's provision for coupon cut offs for noncompliance with the Act to support its standard of care argument. While it is true that a finding of noncompliance is required prior to coupon cut offs, the remedy is an extreme one, causing greatest injury to those the Act was designed to aid. It is not inconsistent, however, to impose strict liability (hence, requiring no finding) in a situation where the remedy is not so drastic and is designed merely to maintain a smooth flow of program funds. And the provision of the Act requiring the Secretary to issue coupon custody regulations need not be read to impose a standard of care, but instead to give guidance: the government has an interest in seeing that the program runs efficiently; protective measures against theft are necessary to that end; and the Secretary, as head of the responsible agency, is in the best

position to promulgate uniform "procedures" (the Act does not say "standards").

There are no cases interpreting the present regulation, although its predecessor regulation was successfully challenged in *Louisiana v. Butz*, 376 F. Supp. 703 (M.D. La. 1974), and in *N.M. Dept. of Health and Social Services v. Secretary*, 276 F. Supp. 953 (D. N.M. 1973). Under that regulation, the states were required to pay for stamps for which they could not "account fully." Both courts found that the language of the regulation itself could not impose strict liability.[2]

The recent case, *Century Bank of Gainesville v. United States*, No. 318-78 (Ct. Cl. Sept. 10, 1980), sustaining the validity of a liability allocation regulation issued pursuant to §§ 2013 and 2019, provides a suitable analogy. In *Century Bank*, the contested regulation made FNS liable for losses of shipments of cancelled coupons in transit to banks that are part of the federal food stamp program. It provided, however, that "[c]oupons shall not be deemed in transit while in the custody and care" of such a bank. 7 C.F.R. § 272.5. The implication was, of course, that FNS would not be liable for pre-transit losses. Century Bank sought and was refused payment for a bag of cancelled coupons that had disappeared from its mailroom. In upholding the regulation the Court of Claims found that the Secretary had authority to issue such a regulation, subject only to a standard of reasonableness:

> . . . the Secretary had the power to issue a regulation of this stripe. Congress had given him broad regulatory authority. [citation]. The Government is not necessarily liable for coupons lost by the bank while in the bank's own custody, and can therefore free itself of such liability unless that position must be characterized as unreasonable. It is not unreasonable,

[2] Although both courts, in dictum, were of the opinion that the regulation was inconsistent with the regulations instructing states on the care and handling of coupons, we disagree with that opinion.

> however, to have the Federal Government assume liability only for "in transit" losses, where the transmitting bank had no control and there was no non-federal entity which could be responsible. . . . the Government was not required to disregard the fact that the bank had custody and care, and that it would not be outrageous to have the custodian to bear its own responsibility. The Secretary could, accordingly, adopt a regulation which set forth a clean rule of no pre-transit federal liability. . . .
> Slip opinion at 5-6.

The Court of Claims found the strict liability provision to be a reasonable exercise of power primarily because it would be unduly burdensome to require the government to investigate each loss to determine fault. It did not address whether the regulation was consistent with the purpose of the Act but merely pointed to what it considered the Secretary's "broad" authority under § 2013.

The basic premise of *Century Bank* — that imposition of strict liability for loss on custodians of stamps is, when reasonable, a valid exercise of authority and is not inconsistent with the Act — can be carried over to this case.

We therefore find the contested regulation here to be a valid and reasonable exercise of the Secretary's § 2013 authority to administer the Act effectively: it is certainly justifiable as administratively precise and simple, it places responsibility for loss on the party in the best position to protect against it, and it is not an unduly harsh remedy, such as a coupon cut off, that would be contrary to the purposes of the Act.

III.

The Secretary contends that it is unnecessary to remand this case for a consideration of the two issues the district court did not rule on in the first instance (whether offsetting Maryland's letter of credit for administrative costs was lawful and whether the regulation was prom-

ulgated in compliance with the Administrative Procedure Act) because the other two claims are "wholly unmeritorious." Reply Brief at 4. The court of appeals, however, is in no position to act on issues that the district court has expressly left undecided. We therefore remand for the district court to consider the cross motions for summary judgment on those issues.

REVERSED AND REMANDED.

United States Court of Appeals
for the Fourth Circuit

February 17, 1981

NOTICE OF JUDGMENT

Judgment was entered in Case No. 80-1076 this date.

The Court's opinion is enclosed.

WILLIAM K. SLATE, II
Clerk.

APPENDIX C

In the United States District Court
for the District of Maryland

Civil No. Y-78-2039

Kalman R. Hettleman, et al.

v.

Robert Bergland, et al.

Filed: November 27, 1981

Young, United States District Judge

MEMORANDUM OPINION AND ORDER

This litigation grew out of a series of thefts of food stamps from four distribution facilities in Maryland in fiscal year 1976. When the thefts occurred, the United States Department of Agriculture (USDA) notified the state of Maryland that the state was strictly liable for the amount of theft losses pursuant to 7 C.F.R. § 271.7(c).[1] The federal government requested that the state remit the amount owing, $113,962,[2] and Maryland refused to pay. Subsequently, USDA set off the amount owed against the amount to which Maryland was otherwise entitled as reimbursement for its administrative costs.

[1] 7 C.F.R. § 271.7(c), when originally promulgated was numbered § 271.7(b). For the text of the regulation, *see* text of the Opinion *infra*.

[2] A dispute over the theft of $7,818 from one of the distribution centers was settled after the filing of Maryland's original complaint, so that the amount in dispute now is $106,164.

The Maryland Department of Human Resources (DHR), which administers the food stamps program in Maryland then filed suit against USDA-FNS, challenging the validity of the regulation insofar as it imposes a standard of strict liability on the State for the face value of food stamps stolen after delivery into state custody. DHR asserted that the strict liability standard embodied in 7 C.F.R. § 271.7(c) was inconsistent with the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964), as amended and codified, 7 U.S.C. § 2011 *et seq.* (1976), and thus not within the rule-making authority of the Secretary. DHR also argued that the promulgation of the regulation was illegal under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and contested USDA's set-off of the face value of food stamps stolen in 1976 against the State's 1978 federal letter of credit for administrative expenses.

On cross motions for summary judgment, this Court held that the strict liability standard of 7 C.F.R. § 271.7(c) was not within the authority of the Secretary in *Hettleman v. Bergland*, 480 F. Supp. 782 (D. Md. 1979). That determination was reversed [642 F.2d 63 (4th Cir. 1981)], and the case was remanded for consideration of the two issues left undecided. This case is now before the Court on renewed cross motions for summary judgment based on those issues.

HISTORY OF THE REGULATION

From the outset of the food stamp program, the states' liability for thefts of coupons in state agency custody was governed by the following regulation:

> (b) If C&MS (Consumers and Marketing Service) determines that there has been a failure on the part of the State agency to account fully for coupons distributed to it, or the sums authorized to be collected by it in payment of the purchase requirement including the cash equivalent of any vouchers or warrants accepted by it in accordance with § 1601.6(c), the State agency shall, on demand by

> C&MS, pay to C&MS, in accordance with instructions issued by C&MS, the amount due as a result of such failure. 7 C.F.R. § 1601.7(b).

When the Act was amended in 1971 to provide for nationwide standards of eligibility, the implementing regulations were also amended. Section 1601.7(b) was renumbered to § 271.7(b) and was published as a proposed rule at 36 Fed. Reg. 7240, 7247-8 on April 6, 1971. The proposed rule provided:

> (b) If FNS determines that there as been a failure on the part of the State agency to account fully for the coupons distributed to it, or the sums authorized to be collected by it in payment of the purchase requirement including the cash equivalent of any vouchers or warrants accepted by it in accordance with § 271.6(c), including, but not limited to, losses of coupons or funds as a result of theft, embezzlements or unexplained causes, the State agency shall, on demand by FNS, pay to FNS the amount due as a result of such failure. Coupons which are not accounted for will be presumed to have been redeemed in the customary channels of redemption: *Provided*, That the State agency will be relieved of liability for such coupons which it establishes to the satisfaction of FNS were recovered or destroyed prior to presentation for redemption.

Comments were solicited and received on the proposed regulations, including § 271.7(b), and on July 29, 1971, the USDA promulgated the rules with revisions made after consideration of the comments at 36 Fed. Reg. 14102 (1971). The final regulation numbered 271.7(b) is as follows:

> If FNS determines that there has been a loss of coupons distributed to the State agency, or of the sums required to be collected by it in payment of the purchase requirement, including the cash equivalent of any vouchers or warrants accepted by it in accordance with § 271.6(c), including, but not limited to, coupons or funds lost as a result of thefts,

> embezzlements or unexplained causes, the State agency shall, on demand by FNS, pay to FNS the face amount of such cash or cash equivalent. Coupons which are lost will be presumed to have been redeemed in the customary channels of redeption: *Provided*, That the State agency will be relieved of liability for such coupons which it establishes to the satisfaction of FNS were recovered or destroyed prior to presentation for redemption.

Plaintiffs challenge the validity of the new regulation, 7 C.F.R. § 271.7(c), based on the Secretary's failure to comply with the provisions of 5 U.S.C. § 553, the rule-making provision of the Administrative Procedure Act.[3] Section 553 reads, in pertinent part:

> (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
>
> * * * * * *
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
>
> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed;
> and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

[3] Plaintiffs initially claim there was also a violation of 5 U.S.C. § 552, which is the provision governing public information. Plaintiffs do not argue, however, and it is clear from the documents submitted, that there was no failure to *publish* in the Federal Register, all pertinent forms of the regulation.

> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;
>
> * * * * * *
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

The APA by its own terms does not govern the food stamp program because it is excepted by virtue of § 553(a)(2) as a matter relating to public grants or benefits. *Rodway v. United States Department of Agriculture*, 514 F.2d 809 (D.C. Cir. 1975). On July 24, 1971, however, the USDA promulgated a regulation making the procedural requirements of the APA applicable to its rule-making in cases relating to "public property, loans, grants, benefits, or contracts." 36 Fed. Reg. 13804. The regulation, which was effective immediately, has the force and effect of law. *Rodway v. USDA*, *supra*, 514 F.2d at 814. The regulation bound the Secretary to comply thereafter with the provisions of the APA. *Id.*

The Court must therefore determine whether the Secretary complied with the dictates of 5 U.S.C. § 553, and, if so, whether the set-off method of collecting the amount due was proper.

LEGALITY OF THE REGULATION UNDER THE APA

The position of the USDA is that the regulations always contemplated that the states would be held strictly liable financially for thefts of coupons and that the different language of the regulation finally promulgated was not a

substantive change but merely served to clarify the possible ambiguities in the existing regulation.[4] The USDA further asserts that the public comments received on the proposed regulation indicate that the affected and interested parties, namely the states, interpreted the "proposal as continuing the strict liability standard." Defendant's Memorandum in support of their Renewed Motion for Summary Judgment, p. 5. Attached as an exhibit to the motion is a summary of comments, suggestions or objections to the proposed regulation, which includes a response by the state of Maryland through its Department of Employment and Social Services. Maryland's comment referring to the portion of the proposed regulations in question was:

> Food Stamps, which are almost as negotiable as U.S. currency are subject to theft or armed robbery at every stage. Because insurance companies do not wish to insure them, we believe the Federal Government should assume the risk provided that the state or its agent are not shown to have been negligent.

The USDA's summary indicates that similar comments were made by four other states and the District of Columbia.

Defendant argues that because the revision of the regulation was merely a clarification of an existing regulation, the notice and basis and purpose statement requirements of the APA are by their terms inapplicable, since they do not apply to "interpretive rules." 5 U.S.C. § 553(b)(A). Defendant argues further that even if the section 553 requirements are applicable, the Secretary complied with them in promulgating the regulation challenged in this suit.

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[4] Several years after the change in wording of the regulation, two district courts held that the language of § 1601.7(b) was too ambiguous to constitute an allocation of strict liability. *State of Louisiana v. Butz*, 376 F. Supp. 703 (M.D. La. 1974); *New Mexico Department of Health and Social Services v. Secretary of Agriculture*, 376 F. Supp. 953 (D. N.M. 1973).

Plaintiffs argue that the final rule constituted a change from existing practice and that such a rule is an interpretive rule of general applicability subject to the publication requirements of §§ 552 and 553. *Aiken v. Obledo*, 442 F. Supp. 628 (E.D. Cal. 1977).[5] Plaintiffs cite internal memoranda from USDA to support their argument that the USDA had not consistently interpreted the regulation requiring the states "to account fully" for coupons as holding the states strictly liable. What the citations show, however, is that the USDA was aware that the courts had determined that the existing regulations were ambiguous, *see* footnote 5, *supra*, and that USDA needed to clarify the language of the regulations in order to make its position clear. The states' awareness of USDA's interpretation is clear from the comments received, including those from Maryland, when the proposed rule 271.7(c) was first published.

Plaintiffs argue further that the sections of the regulations governing a state's duty to use care and caution in storing stamps and in safeguarding them from theft indicate that USDA did not regard § 271.7(c) as imposing strict liability because the safeguarding provisions would then be superfluous. The Fourth Circuit indicated in *Hettleman v. Bergland*, however, that the safekeeping provisions are not necessarily inconsistent with a requirement of strict liability because the former may be promulgated merely to give guidance. 642 F.2d at 66.

The APA at 5 U.S.C. § 553(b)(3) requires that the general notice of proposed rulemaking published in the Federal Register include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The Fourth Circuit has held that the

[5] It is unclear what plaintiffs are arguing. On page 7 of plaintiffs' Memorandum they argue: "The phrase 'to account fully' appeared in the regulation prior to its 1971 revision and USDA consistently interpreted the phrase to mean strict liability." Page 8 contains the sentence: "Moreover, USDA did not consistently interpret § 271.7(b) prior to 1971 as imposing strict liability."

notice must be "sufficient to fairly apprise interested parties of the issue involved . . . , but it need not specify every precise proposal which [the agency] may ultimately adopt as a rule." *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 248 (4th Cir. 1979), *reversed on other grounds*, 101 S. Ct. 295 (1980); *accord. Spartan Radiocasting Co. v. F.C.C.*, 619 F.2d 314 (4th Cir. 1980). It is clear from the comments that USDA received in response to the April 16, 1971 publication of the proposed rule that the interested parties understood the issues involved, because they responded and uniformly suggested a standard of due care.

Although plaintiffs do not argue that the promulgation of a final rule which changes the proposed rule automatically generates a new opportunity for comment, *see id.*, at 322, plaintiffs argue that the change here was so drastic and the rule promulgated was so much more severe than the proposed rule, that a new period for comments should have been allowed. As the Ninth Circuit stated in *Pacific Coast European Conference v. United States*, 350 F.2d 197, 205 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965),

> in rule making hearings the purpose is to permit the agency to educate itself and not to allow interested parties to choose the issues or narrow the scope of the proceedings. The purpose of the notice is to allow interested parties to make useful comment and not to allow them to assert their "rights" to insist that the rule take a particular form.

It is safe to assume that had the rule as it appeared in its final form been published as the proposed rule in April, 1971, it would have generated the same kinds of comments from the states. There is no doubt that the USDA could have, contrary to the commentary, promulgated the strict liability rule anyway. *Hettleman v. Bergland*, 642 F.2d 63. The USDA complied sufficiently with the notice and comment provisions of the APA, and indeed it seems that the period for comments served its purpose.

A far greater problem with the action of the USDA, is the absence of any explanation for the change in language

from the proposed regulation to the final regulation. This can be seen as a violation of the requirement of 5 U.S.C. § 553(c) that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."

Plaintiffs correctly point out that the opportunity to comment is meaningless unless the agency responds to the points made by interested parties. *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). The USDA did publish a summary of the comments received and described the principal changes in 36 Fed. Reg. 20145 on October 16, 1971. There was no specific mention of § 271.7(c) in the four-page commentary. However, the Secretary need not comment on every aspect of the proposed regulations. He is only obligated to comment on major issues raised during the comment period. *Community Nutrition Institute v. Bergland*, 493 F. Supp. 488 (D. D.C. 1980). The requirement of § 553(c) does not require findings and conclusions as detailed as those associated with formal proceedings. *In Re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980). The judgment of the agency as to what issues are major and need comment in the "basis and purpose" statement is subject to review under the arbitrary and capricious standard. *Community Nutrition Institute, supra*, 493 F. Supp. at 493.

In the instant case, the record supports the conclusion that the Secretary viewed the change in the challenged regulation as one clarifying the language so that the USDA's intent to hold the states strictly liable for lost coupons would be clearer that it had been in prior regulations. The basis and purpose statement published in 36 Fed. Reg. 20145 on October 16, 1971, addresses thirty-eight issues, which the Secretary in his discretion could view as the principal changes.[6]

[6] The issue of the Federal Government's being responsible for a larger portion of the costs of operating the Food Stamp program was addressed in comment #17. Since the objection to

The procedural requirements of the APA are intended to assist judicial review as well as provide for fair treatment of persons affected by a regulation. *Home Box Office, Inc., supra*, 567 F.2d at 35. The promulgation of a regulation is reviewed under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A), and it is the court's duty to ascertain whether the regulation was based on a consideration of the relevant factors. *Humana of Virginia v. Blue Cross of Virginia*, 622 F.2d 76 (4th Cir. 1980). There is in the instant case a bare allegation of defendants' failure to comply with the APA. There is no contention that the agency action was arbitrary and capricious or that the state did not have the opportunity to participate in the rule making process. Clearly Maryland could not make this contention because it did submit comments. The failure of the published basis and purpose statement to address directly the challenged regulation does not render that regulation ineffective as to the parties to this litigation. *Arlington Oil Mills, Inc. v. Knebel*, 543 F.2d 1092 (5th Cir. 1976).

THE LEGALITY OF THE OFFSET

Maryland argues that USDA's deduction of the face value of the thefts from the federal letter of credit issued to Maryland to pay the state's administrative costs was unlawful. This Court finds that the procedure used to collect a debt owed by the state to the federal government was in accordance with the dictates of the Federal Claims Collection Act of 1966, 31 U.S.C. § 952(a) and the regulations promulgated thereunder.

The Federal Claims Collection Act authorizes:

> [t]he head of an agency . . . pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, shall attempt collection of all claims of the United States

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the strict liability for loss is basically one of shouldering the financial burden, this comment may be deemed to address generally the issue at hand.

> for money or property arising out of the activities of . . . his agency.

31 U.S.C. § 952(a). Pursuant to this statute, the Comptroller General and the Attorney General promulgated collection standards, 4 C.F.R. § 101 *et seq.* The Secretary of Agriculture adopted these by reference, 32 Fed. Reg. 2805 (1967). The offset was effected by USDA by virtue of these collection standards and 7 C.F.R. § 275.11(e), promulgated pursuant to section 4(c) of the Food Stamp Act of 1964, 7 U.S.C. § 2013(c), which provides:

> (e) *Withholding of payments.* Unless otherwise required by law, payments for proper charges incurred by State agencies will not be withheld unless:
>
> * * * * * *
>
> (2) The State agency is indebted to the United States and collection of the indebtedness will not impair the accomplishment of the objectives of any program sponsored by the United States; . . . When an indebtedness is to be collected, FNS will provide reasonable notice to the State agency, and will require appropriate accounting adjustments to recorded cash balances for which the State agency is accountable to the Federal Government, in order to liquidate the indebtedness.

At the time of the offset to Maryland's letter of credit, January 12, 1978, the regulations under the Federal Claims Collection Act required the agencies "to take aggressive action . . . to collect all claims of the United States for money . . . arising out of the activities of . . . [t]he agency," 4 C.F.R. § 120.1 (1978), and authorized collections by offset "on claims . . . certain in amount in every instance in which this is feasible." 4 C.F.R. § 102.3 (1978).

Maryland claims that USDA failed to comply with 4 C.F.R. § 102.2, which requires that appropriate written demands be made on the debtor in terms which inform the

debtor of the consequences of his failure to cooperate. Maryland fails to cite 4 C.F.R. § 101.2, however, which provides that "failure of an agency to comply with any provision of this chapter shall not be available as a defense to any debtor."[7] Therefore USDA's failure to comply strictly with 4 C.F.R. § 101 *et seq.* is not fatal to the agency's position.

Furthermore, this Court finds that the language of 7 C.F.R. § 275.11(e) was not intended to confer upon the states the right to a determination of whether the collection of the indebtedness would impair the accomplishment of the federal program, but merely to notify the states under what circumstances payments might be withheld from them. The agency itself is in the best position to decide whether its action of offsetting the amount due will impair the federal program. The Court also finds that the notice requirement of the USDA regulation was intended merely to notify the states that the offset was being accomplished, not to create rights in the state to challenge the offset.[8]

[7] Maryland also argues that the provisions of 7 U.S.C. § 2019(f) apply to this agency action, and that the Secretary was therefore bound to comply with the dictates of that section. Section 2019(f) by its terms applies if the Secretary determines that the State agency failed to comply substantially with the food stamp provisions, and allows a reasonable time for the state to come into compliance. Such is not the case in the instant litigation, and § 2019(f) does not apply.

[8] Even if the notice requirement were so intended, the notice given in the instant case was sufficient. The letter from the regional director of the food stamp program informing the Maryland Department of Human Resources that the offset would be accomplished, invited the state to contact the director if it had any questions about the procedure. There is no indication that Maryland did anything in response to that invitation.

For the above reasons, it is this 27th day of November, 1981, by the United States District Court for the District of Maryland, ORDERED:

1. That summary judgment for the defendant BE, and the same IS, hereby GRANTED; and

2. That summary judgment for the plaintiff BE, and the same IS, hereby DENIED.

/s/ JOSEPH H. YOUNG,
United States District Judge.

In The United States District Court
For the District of Maryland

Civil No. Y-78-2039

Kalman R. Hettleman,
Secretary, Department of Human Resources, et al.

v.

Robert Bergland,
Secretary, U.S. Department of Agriculture, et al.

JUDGMENT

In accordance with the Memorandum Opinion and Order of the Honorable Joseph H. Young dated November 27, 1981, filed in the above entitled case, it is

ORDERED AND ADJUDGED:

That Judgment be, and the same is, hereby entered in favor of defendants against plaintiffs.

Dated at Baltimore, Maryland this 27th day of November, 1981.

PAUL R. SCHLITZ, Clerk
BY: /s/ R. BRUCE MCELHONE
Deputy Clerk

APPENDIX D

United States Court of Appeals
For the Fourth Circuit

No. 82-1972

Kalman R. Hettleman,
Secretary, Department of Human Resources et al.

Appellants,

v.

John R. Block,
Secretary, U.S. Department of Agriculture, et al.

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Joseph H. Young, District Judge.

Argued June 10, 1982 *Decided July 6, 1982*

Before HAYNSWORTH, Senior Circuit Judge, SPROUSE and CHAPMAN, Circuit Judges.

PER CURIAM:

Maryland officials challenged the legality of the United States Department of Agriculture's decision to withhold approximately $100,000 from Maryland's federal letter of credit for expenses incurred by the state in administering

the federal food stamp program. The Department took this action to recover the cost of food stamps stolen from distribution centers in Maryland. The district court granted the defendants' motion for summary judgment.

Upon consideration of the briefs and oral argument before this court, we affirm for the reasons stated by the district court in its opinion. *Hettleman v. Bergland*, Civ. No. Y-78-2039 (D. Md. Nov. 27, 1981).

AFFIRMED.